Office-Supreme Court, U.S.
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MAY 27 1981
ALEXANDER L. STEVAS,
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80-2001

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD ROLAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD M. GENSON
JEFFREY B. STEINBACK
134 North LaSalle #300
Chicago, Illinois 60602
(312) 726-9015
Attorneys for Petitioner

Of Counsel:
WILLIAM H. STEVENS

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that there was sufficient evidence of intent to defraud to sustain Petitioner's convictions under 18 U.S.C. 1962(d) and 1952(a).

2. Whether the Court of Appeals improperly extended the racketeer influenced and corrupt organizations act in contravention of well recognized rules of statutory interpretation, established precedent and principles of double jeopardy, in concluding that the evidence supported the conclusion that Petitioner conspired to participate in the affairs of Tri-No Enterprises, Inc. through a pattern of racketeering activity.

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CLIFFORD ROLAND,

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VS.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Clifford Roland prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The order of the District Court for the Southern District of Illinois is appended to this petition as Appendix A. The published opinion of the United States Court of

Appeals for the Seventh Circuit is appended hereto as Appendix B. The order denying Petitioner a rehearing is likewise appended to this petition as Appendix C.

JURISDICTION

The order of the Court of Appeals was entered on March 20, 1981. Petitioner's Petition for Rehearing with en banc suggestion, timely filed, was denied on April 21, 1981. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 20(1) and (4) of the rules of this court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . subject for the same offense to be twice put in jeopardy of life and limb . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

18 U.S.C. 1952 ("Travel Act") provides in pertinent part:

> "(a) Whoever travels in interstate . . . commerce or uses any facility in interstate . . . commerce, including the mail, with intent to— . . .
>
> "(3) Otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified . . . (above), shall be fined not more than $10,000 or imprisoned for no more than five years, or both.
>
> "(b) As used in this section 'unlawful activity' means . . . (2) . . . arson in violation of the laws of the state in which they are committed or of the United States."

18 U.S.C. 1961 ("RICO") provides in pertinent part:

> "As used in this chapter—
>
> "(1) 'Racketeering activity' means (A) any act . . . involving . . . arson . . . which is chargeable under state law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, U.S.C.: . . . Section 1341 (relating to mail fraud), . . . Section 1952 (relating to racketeering) . . .
>
> "(4) 'Enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> "(5) 'Pattern of racketeering activity' requires at least two acts of racketeering activity . . ."

18 U.S.C. 1962 ("RICO") provides in pertinent part:

> "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .
>
> "(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."

Illinois Revised Statutes, Chapter 38, Sec. 20-1 ("Arson") provides, in pertinent part:

> "A person commits arson when, by means of fire or explosive, he knowingly:
>
> > "(b) with intent to defraud an insurer, damages any property or any personal property having a value of $150 or more."

STATEMENT OF THE CASE

Petitioner Clifford Roland was charged in two counts of a two count indictment. Count I charged Petitioner, together with Noble Starnes, Gerald Rodney Shurman and Donald Wayne Murphy, with conspiracy to use a pattern of racketeering activity in the conduct of the affairs of an enterprise engaged in interstate commerce, in that Roland, Murphy and Shurman would travel in interstate commerce to commit an arson in violation of Illinois law; that Shurman and Murphy would commit the said arson; that Starnes, as President of Tri-No Enterprises, Inc., a corporation engaged in interstate commerce, would make a false claim for damages on behalf of the said company, under a certain insurance policy; and that Starnes would commit mail fraud in violation of 18 U.S.C. 1341 by causing the use of the mail as part of said conspiracy to defraud the insurance company via the false claim. Count II of the indictment charged Petitioner Roland, together with Gerald Rodney Shurman and Donald Wayne Murphy, with travel in interstate commerce with intent to promote, manage, establish, carry on and facilitate the promotion, management, carrying on and establishment of unlawful activity, said unlawful activity being an arson in violation of Chapter 38, Section 20-1(b), Illinois Revised Statutes, all in violation of Title 18, U.S.C., Sec. 1952(a)(3).

Petitioner Roland and co-defendant Noble Starnes were tried together before a jury, the Honorable James L. Foreman, judge presiding, in the District Court for the Southern District of Illinois. The evidence at trial is summarized in part I of the Court of Appeals' slip opinion, appended hereto as Appendix B, and is not repeated here to avoid unnecessary duplication. Additional facts material to the consideration of the questions presented are set forth

within the relevant portions of the Reasons for Granting the Writ.

At the close of all the evidence, the jury found both Roland and Starnes guilty as charged. Motions for judgment of acquittal or, alternatively, for a new trial were denied in a written order attached hereto as Appendix A. Petitioner Roland was sentenced on Count I to a term of six years imprisonment and a $5,000 fine, and on Count II to a term of five years imprisonment and a $5,000 fine, the terms of imprisonment and the fines to be concurrent.

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. 1291. The Court of Appeals affirmed in a judgment and order dated March 20, 1981, attached hereto as Appendix B. Petitioner's petition for rehearing with en banc suggestion, timely filed, was denied in an order dated April 21, 1981, attached hereto as Appendix C. The instant petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erred in concluding that there was sufficient evidence of intent to defraud to sustain Petitioner's convictions under 18 U.S.C. 1962(d) and 1952(a).

The factual basis for the convictions in the present case is a fire in the offices of Tri-No Enterprises, Inc. located in the Royal Oaks Business Complex in Herrin, Illinois. On the basis of this single fire, Petitioner Roland and co-defendant Noble Starnes were convicted of conspiracy to participate in the conduct of Tri-No's affairs through a pattern of racketeering activity, to-wit: traveling across state lines to commit arson, arson with intent to defraud, and mailing a fraudulent insurance claim with the insurer of the burned premises, all in violation of 18 U.S.C. 1962 (c) and (d). In addition, Petitioner was convicted of a separate count of traveling across state lines to commit the arson in violation of the Travel Act, 18 U.S.C. 1952(a).

An essential element of all three alleged racketeering acts, including Petitioner's violation of the Travel Act, is the intent to defraud an insurer. The Seventh Circuit improperly concluded, on the basis of a highly selective and speculative reading of the facts, that there was sufficient evidence from which the jury could infer that both Roland and Starnes possessed an intent to defraud Starnes' insurance company.

The Seventh Circuit concluded that there was sufficient evidence of Starnes' intent based on evidence that his business was in need of cash, he recently had increased his insurance coverage, and he had an adjuster file a claim with

the insurer after the fire, even though he was aware that he had no basis for the claim. (Appendix B, at App. 12-13). In fact, there was no evidence that Starnes was in financial difficulties. James Jacoby testified for the government that Starnes had not paid him for the November 1977 portion of a coal shipment. Another government witness, Keith Bodkins, testified that he hauled Jacoby's coal for Starnes and Starnes owed him for this. Jacoby and Bodkins never offered any explanation as to why they had not been paid. Jacoby and Bodkins never testified that Tri-No was in financial straits. Starnes' debts to Jacoby and Bodkins, by themselves, are not evidence of financial difficulty, they are merely evidence of debts. Without some idea of the reason for the nonpayment or some idea of Starnes' total income and the nature of his business affairs in Texas and elsewhere, it is impossible to tell whether Starnes was in financial difficulty or not. The government produced absolutely no evidence of such a nature.

The Seventh Circuit also ignored the evidence at trial in relying on the fact that Starnes had recently increased his insurance coverage and that a claim was filed with Starnes' insurer after the fire. In fact, although Starnes did increase his insurance coverage on the Tri-No building, government witness Caveness testified that he, Caveness, recommended the increase following the expiration of Starnes' prior policy. Further, government witness William Boyd, the adjustor who presented the insurance claim to Starnes' insurer, testified that he, Boyd, contacted Starnes, Starnes did not contact him.

In addition, the court overlooked or ignored the testimony of government witness Barcley, a police officer, who stated that only hours before the fire Starnes reported to the police threats against his property because of rumors that Starnes was hauling coal from Kentucky.

The evidence considered by the Seventh Circuit to support its conclusion that Starnes had the requisite intent is nowhere near the evidence considered sufficient in *People* v. *Berland,* 74 Ill.2d 286, 385 N.E.2d 649 (1978), cited by the court on Page 4 and 5. In *Berland,*

> "Prior to the fire the building was two-thirds vacant. Rent revenues had fallen from $650 per month to $250 per month. The building had been cited for thirty-five violations of the Municipal Code of Chicago. The building was losing money, and Berland had tried to sell it on contract on three occasions. The purchasers reneged."

While the evidence does show that Noble Starnes knew that the building was insured and the evidence also shows that an insurance claim was subsequently filed, these facts alone are insufficient proof of intent to defraud. A person may certainly destroy his own property, whether insured or not, without fear of criminal liability. One is only criminally liable if he destroys his property with the contemporaneous intent to injure, cheat or defraud the insurance company. The kind of evidence required to prove a contemporaneous intent to defraud, suggested in *People* v. *Berland, supra,* and in *People* v. *McAleer,* 34 Ill.App.3d 821, 341 N.E.2d 72 (1st Dist., 1975), is utterly lacking in the present case. The evidence against Starnes might be sufficient to prove an act of mail fraud after the fire, but it is plainly insufficient to prove the existence of a conspiracy previous to the fire.

With respect to the court's conclusion regarding Petitioner Roland's intent, it is only necessary to review the court's reasoning to see the insufficiency in the proof. The court reasons that Starnes had the requisite intent, Starnes talked to Roland, and therefore Roland probably had the requisite intent. (Appendix B, at App. 13). Further, the court reasons, Roland was a businessman, businessmen

know you don't burn office records for "some farfetched public relations gimmick," therefore Roland knew that Starnes would make it financially worthwhile by defrauding his insurance company. "Moreover," the court reasons, "several weeks *after* the blaze Roland told Shurman that the latter would receive full payment 'after the insurance settlement was made on the building,' " (emphasis added), Appendix B at App. 14, and Roland did not express surprise! Proof of this nature is plainly insufficient to overcome the presumption of innocence and establish proof beyond a reasonable doubt that Roland intended to defraud Starnes' insurance company when he crossed the Indiana-Illinois border on February 19, 1978, or at any time before or after that date. There is simply no evidence that Petitioner intended to do anything more when he traveled to Illinois than help Noble Starnes burn Starnes' office at his request and with his consent, a wholly innocent and lawful activity.

As there was insufficient evidence to prove Petitioner Roland guilty beyond a reasonable doubt of the offenses of conspiracy and violation of the Travel Act, his convictions should be reversed.

2. The Court of Appeals improperly extended the Racketeer Influenced and Corrupt Organizations Act in contravention of well recognized rules of statutory interpretation, established precedent and principles of double jeopardy in concluding that the evidence supported the conclusion that Petitioner conspired to participate in the affairs of Tri-No Enterprises, Inc. through a pattern of racketeering activity.

The conspiracy convictions in the present case are based on an almost magical foundation. In the opinion of the Court below, the burning of Tri-No Enterprises, Inc. involved four offenses: conspiracy to participate in the

affairs of Tri-No, arson with intent to defraud an insurer, interstate travel with intent to commit arson, and use of the mails in furtherance of the scheme to defraud. And yet, in concluding that the evidence was sufficient to support the convictions, the opinion of the Court of Appeals makes it appear as if the only crime committed was burning with intent to defraud an insurer. The baffling nature of the present case, and the opinion below, arises from the unusual identity between the four offenses involved. In view of the identical nature of the offenses involved, Petitioner's conspiracy conviction is clearly inconsistent with the Fifth Amendment prohibition against double jeopardy and the plain language of the Racketeer Influenced and Corrupt Organizations Act regarding participation in the conduct of an enterprise's affairs through a pattern of racketeering activity.

The double jeopardy clause of the Fifth Amendment "protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717 (1969). "Cases in which the government is able to prove violations of two separate criminal statutes with precisely the same factual showing . . . raise the prospect of double jeopardy." *Simpson* v. *United States,* 435 U.S. 6, 11 (1978). In the present case, it is evident that all four alleged offenses are in fact one offense. The hallmark of all three alleged racketeering acts and of the RICO count is the intent to defraud an insurer. Proof of one is proof of all. The opinion of the court below, and of the District Court below attached hereto as Appendix A, make this fact quite clear: upon finding sufficient evidence of an intent to defraud an insurer, the court summarily concluded that the jury could reasonably have found the defendants guilty of all four crimes. The double jeopardy problem presented by the unusual application of the RICO statute in the present case was not even considered by the court below.

In addition to the aforementioned conflict with the double jeopardy clause, it is readily apparent that the facts in the present case do not constitute participation in the affairs of an enterprise through a pattern of racketeering activity within the common meaning of those words. It is equally apparent that the facts in the instant case do not involve activity on the part of organized crime, the original target of the RICO statutes. The court below concluded that RICO applied to the facts in the instant case based on a narrow interpretation of the definition of racketeering activity in 18 U.S.C. 1961(1) and (5), and a broad interpretation of participation in the affairs of an enterprise. The authority relied on by the court is simply too insubstantial to support the unprecedented application of RICO in the present case, particularly in light of well recognized rules of statutory construction requiring the strict interpretation of criminal statutes in favor of the accused,* and requiring doubt to be resolved against turning a single transaction into multiple offenses.**

The unusual nature of the so-called "pattern" of racketeering activity in this case is indicated by a comparison of the facts in this case with the facts in several other cases. In *United States* v. *Weatherspoon*, 581 F.2d 595 (7 Cir., 1978), for example, the court held that several mailings, each of which was an indictable act under 18 U.S.C. 1341, was sufficient evidence of a pattern. *United States* v. *Parness*, 503 F.2d 430 (2 Cir., 1974), involved a pattern of three violations of 18 U.S.C. 2314. *United States* v. *Morris*, 532 F.2d 436 (5 Cir., 1976) involved a pattern of several card games involving cheating techniques.

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* *Huddleston* v. *United States*, 415 U.S. 814, 830-831 (1974); *United States* v. *Resnick*, 299 U.S. 207, 209 (1936).

** *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).

United States v. *Elliott*, 571 F.2d 880 (5 Cir., 1978) involved a criminal enterprise in a pattern including arson, car theft, fencing stolen goods, murdering a key witness, and dealing in narcotics. Petitioner is aware of no RICO case interpreting as a pattern a single course of conduct such as that in the present case.

The Court of Appeals' reliance on the definitional section of the RICO Act, 1961(1)(A) and (B), which denominates arson, mail fraud and violations of 18 U.S.C. 1952, as racketeering activity, and the court's conclusion, based on *United States* v. *Weatherspoon*, 581 F.2d 595 (7 Cir., 1978) that "the fact that there is but one objective underlying the separate acts does not diminish the applicability of RICO to those acts," ignores the plain meaning of the word "pattern". If the Court of Appeals were correct, then any two acts would constitute a pattern. Such a result is plainly absurd. RICO applies to the facts in the present case, if at all, only because the definitional section of the statute has assumed a life of its own, divorced from the original intention of the legislature.

The Court of Appeals' conclusion that the burning of the Tri-No offices constituted participation in the affairs of the enterprise is simply not warranted by the ordinary meaning of the word participation. The court might as well have construed an assault and battery as a personal relationship. Further, the court's conclusion is inconsistent with numerous cases requiring that participation be in furtherance of the enterprise's purposes. See, for example, *United States* v. *Sutton*, 605 F.2d 260, 270 (6 Cir., 1979), rehearing en banc granted November 7, 1979; *United States* v. *Nerone*, 563 F.2d 836, 851-2 (7 Cir., 1977). But Cf. *United States* v. *Field*, 432 F.Supp. 55 (1977).

As the application of RICO to the facts in the present case contravenes the prohibition against double jeopardy

and is plainly not warranted by the plain meaning of the RICO Act or any precedent, Petitioner's conviction for conspiracy in violation of 18 U.S.C. 1962(c) and (d) should be reversed.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be allowed to review the instant decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWARD M. GENSON
JEFFREY B. STEINBACK
134 North LaSalle #300
Chicago, Illinois 60602
(312) 726-9015
Attorneys for Petitioner Roland.

APPENDIX

APPENDIX A

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,

vs. Criminal No. 78-02018-01-B
78-02018-03-B

NOBLE STARNES,
CLIFFORD ROLAND,
Defendants.

ORDER

FOREMAN, Chief Judge:

Before the Court are defendants Starnes' and Roland's motions for judgment of acquittal, or, alternatively, for a new trial or for arrest of judgment.

In July, 1978, the Grand Jury returned a two count indictment against defendants Noble Starnes, Clifford Roland, Gerald Shurman and Donald Murphy. In Count I, the four defendants were charged with conspiracy to participate in the conduct of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(C) in that defendants Roland, Murphy and Shurman traveled across state lines from Gary, Indiana to Herrin, Illinois with the intent to commit arson in violation of Illinois

Revised Statutes c. 38, §20-1(b); that defendants Murphy and Shurman burned the building in violation of Illinois Revised Statutes c. 38 §20-1(b) and that defendant Starnes caused a false claim to be mailed and filed with the insurer of the burned premise in violation of 18 U.S.C. §1341. Count two charged defendants Shurman, Roland and Murphy with crossing state lines with the intention of committing arson in violation of Illinois Revised Statutes c. 38 §20-1(b) and that they did in fact commit arson. On January 3, 1979, the defendants Starnes and Roland were tried by a jury in this Court and found guilty of the counts as charged in the indictment.[1] Defendants Starnes and Roland now move for judgment of acquittal, or, alternatively, a new trial or an arrest of judgment and in support thereof, present three grounds.

The defendants first assert that the government failed to produce sufficient evidence to show that the defendants conspired to commit a pattern of racketeering activity. Specifically, they contend that the government failed to prove that the defendants agreed to burn the office complex of Tri-No Enterprises for the purpose of defrauding an insurer.

The standard by which this Court must test defendants' motion for judgment of acquittal is whether substantial evidence taken in the light most favorable to the government, tends to show that the defendant is guilty beyond a reasonable doubt. *United States* v. *Fearn,* 589 F2d 1316 (7th Cir. 1978); *Glasser* v. *United States,* 315 U.S. 60 (1942). Thus, the trial judge must determine whether upon the evidence, "giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifi-

[1] Defendants Shurman and Murphy pursuant to a plea agreement had previously pleaded guilty to Count I.

able inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States* v. *Yeoman-Henderson, Inc.*, 193 F2d 867, 869 (7th Cir. 1952).

In Count I, the defendants were convicted of conspiring to participate in the conduct of an enterprise through a pattern of racketeering activity. The gist of this conspiracy is that the defendants agreed to burn an office complex in Illinois with the intent to defraud an insurer. The defendants candidly concede that the government produced sufficient evidence to show that they agreed to leave Indiana and travel to Illinois in order to burn the Tri-No Enterprise building. The issue, therefore, is whether the government produced sufficient evidence to show that they agreed to burn the building with the intent to defraud an insurer.

Under conspiracy law, it is fundamental that a conviction cannot be sustained unless there is proof of an agreement to commit the offense. *Ingram* v. *United States*, 360 U.S. 672 (1959). Although there need not be proof that the conspirators were aware of the criminality of their objective or each and every detail of the plan, there must be clear and unequivocal evidence of the defendants' knowledge of the purpose of the conspiracy. Such knowledge, however, may be inferred from the circumstances, acts and conduct of the parties. *Ingram, supra* at 678, *United States* v. *Fellabaum*, 408 F2d 220 (7th Cir. 1969). Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself. *Ingram, supra* at 678. Thus, in order to be guilty of conspiracy, the defendants must know what kind of criminal conduct is in fact contemplated. *United States* v. *Gallishaw*, 428 F2d 760

(2d Cir. 1970). A mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, is insufficient to establish a conspiracy. *United States* v. *Purin*, 486 F2d 1363 (2d Cir. 1973).

In applying these principles to the present case, the Court initially notes that part of the ultimate underlying substantive offense is arson or burning with the intent to defraud an insurer. Thus, in order to assess the sufficiency of the evidence of the defendants' intent to defraud an insurer, the Court has surveyed the law of arson in Illinois and various other states.

In Illinois, as well as several other states, an agent who burns the owner's building at the request of the owner cannot be guilty of arson. *Ill Rev Stat* c. 38 §20-1. Thus, if an owner of a building desires to rid himself of a building by burning and can limit the fire to his own building, either he or one he hires may legally do so unless they intend to defraud an insurer. Thus, intent to defraud an insurance company is the very essence of this type of arson. This intent cannot exist without knowledge that the property is insured. *State* v. *Greer*, 243 Mo. 599, 147 S.W. 968 (1912). Ordinarily, when one purposely or designedly performs an unlawful act, the law presumes that he intends the natural consequences of such act. However, this rule does not apply in arson cases where the building is burned with the consent of the owner because no crime can be committed by the mere burning of the building. Consequently, to convict a defendant of arson with intent to defraud an insurer, it is necessary to prove that he had knowledge that the property was insured. *Greer, supra* at 970. This knowledge may be proven by circumstantial evidence. *State* v. *Bersch*, 276 Mo. 397, 207 S.W. 809 (1918).

The substance of the evidence in the present case was that defendants Roland, Murphy and Shurman met at de-

fendant Roland's bar in Gary, Indiana, on February 12, 1978. At that meeting, these defendants agreed to do a "torch job" in Southern Illinois after defendant Roland had consulted his "friend in Dallas." Toll calls records showed that calls were made from defendant Roland's bar to defendant Starnes' phone in Aledo, Texas. Although the term "torch job" was defined as burning a building, defendant Shurman stated that it was understood that it was to be an office fire to destroy records and it was related to the coal miners. Before the meeting was concluded, defendant Roland gave defendants Shurman and Murphy $100.00 with which to purchase lacquer thinner. The defendants also agreed that Shurman and Murphy were to be paid $2,000.00 for their services.

On February 19, 1978, the evidence showed that defendants Roland, Murphy and Shurman left Gary, Indiana and traveled to Christopher, Illinois, where they met defendant Starnes. Defendants Starnes and Roland had a conversation and then the four defendants traveled to the building owned by Tri-No Enterprises, Inc., whose president was Noble Starnes. At that time, defendant Starnes told defendants Shurman and Roland that the whole building had to be destroyed completely, that it was no longer a situation where the office was to be burned. Defendant Shurman testified that he understood the fire was to be blamed on the United Mine Workers. Defendant Starnes then removed various records, office equipment and riding lawnmowers as the other three defendants prepared for the fire. Defendant Starnes then left for the airport in order to give him an alibi. Later that evening defendants Shurman and Murphy burned the building as planned, eluded the police and around 2:00 A.M. the three defendants left Southern Illinois and returned to Gary, Indiana.

Defendant Shurman testified that on the afternoon of the fire he received $1,400.00 and was informed he would receive the balance of the money later. Upon their return to Indiana, defendant Shurman testified that no additional money would be forthcoming because the fire had not badly damaged the building. Defendant Shurman testified he later learned that the building had been substantially damaged. He thereafter talked with defendant Roland who then indicated that the balance of money would be paid after the insurance settlement on the building was made.

The evidence also showed that defendant Starnes was having financial difficulties during this period and shortly before the building was burned, increased his insurance coverage. After the fire, defendant Starnes contracted with Associated Adjusters of Michigan to file a claim with Commercial Union Insurance Company of Massachusetts.

Upon consideration of this evidence, the Court finds that it was sufficient for the jury to infer that the defendants agreed to burn the building with the intent to defraud an insurance company. Defendant Starnes was president of Tri-No Enterprises and procured the services of his friend, Mr. Roland, to aid him in setting the fire. Defendant Starnes was having financial difficulties and increased his insurance coverage. Before the fire, he removed numerous items from the building and emphasized that the building must be completely destroyed. After the fire, he contacted a private adjustor to file an insurance claim.

Defendant Roland was a friend of defendant Starnes and he secured the services of Shurman and Murphy to aid him in the project. Defendant Roland coordinated the project and drove from Indiana to Southern Illinois where they met defendant Starnes. Upon their return to Indiana, defendant Roland informed Shurman and Murphy no addi-

tional money would be forthcoming because the building had not been badly damaged. Finally, defendant Roland later told Shurman that the balance would be paid upon receipt of the insurance money.

Similarly, the Court also finds sufficient evidence for the jury to infer that defendant Roland, along with Shurman and Murphy, crossed state lines with the intent to burn defendant Starnes' building for the purpose of defrauding an insurer. Accordingly, the defendants' motions for judgment of acquittal for lack of sufficient evidence is DENIED.

The defendants next assert that the evidence fails to show that the defendants conspired to commit a pattern of racketeering activity. The pattern of racketeering activity charged is that the defendants agreed to travel from Indiana to Illinois with intent to commit arson, that they committed the arson and that a false insurance claim was sent through the mail in order to defraud the insurer. Thus, the defendants' claim that the one series of transactions, although technically three violations, is insufficient to constitute a pattern. This Court disagrees with that conclusion.

18 U.S.C. §1961(5) defines a "pattern" of racketeering activity as at least two acts of racketeering activity. Racketeering activity is defined in 18 U.S.C. §1961(1) as "any act . . . involving . . . arson . . . chargeable under state law and punishable by imprisonment for more than one year; any act which is indictable under . . . section 1341 (relating to mail fraud), . . . section 1952 (relating to racketeering)." Accordingly, the defendants engaged in a pattern of racketeering activity within the meaning of 18 U.S.C. §1961(5) because they jointly committed two or more acts of "racketeering activity." *See, United States* v. *Weatherspoon*, 581 F2d 595 (7th Cir. 1978).

Finally, the defendant Roland has moved for an acquittal, or alternatively, a new trial because he contends that the government failed to prove that the defendants participated in the conduct of an enterprise. The Court also disagrees with this contention. The evidence at trial showed that Tri-No Enterprises, Inc., was a corporation which transacted business in interstate commerce. Defendant Starnes was the president of Tri-No Enterprises, Inc., and Tri-No was the contracting party on the insurance policy. Defendant Roland conspired with defendant Starnes and apparently was to be paid out of Tri-No funds. Consequently, both defendants participated either directly or indirectly in Tri-No's affairs through a pattern of racketeering activity. *United States* v. *Elliott*, 571 F2d 880 (5th Cir. 1978).

In sum, defendants' motions for judgment of acquittal or for a new trial or for arrest of judgment are DENIED.

IT IS SO ORDERED.

DATED: Feb. 15, 1980.

/s/ James L. Foreman
CHIEF JUDGE

APPENDIX B

Nos. 80-1437, 80-1438

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NOBLE R. STARNES and CLIFFORD ROLAND,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois, Benton Division.

No. 78-Cr-02018—**James L. Foreman**, Judge.

ARGUED NOVEMBER 7, 1980—DECIDED MARCH 20, 1981

Before CUMMINGS, WOOD, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

WOOD, *Circuit Judge.* Defendants Noble Starnes and Clifford Roland appeal from a jury verdict that found them guilty of violating 18 U.S.C. § 1962(d), a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO). The indictment charged that Starnes and Roland violated RICO by conspiring to engage in a pattern of racketeering in connection with a scheme to commit arson with intent to defraud an insurer, in violation of Illinois law. The arson consisted of setting fire to a building that housed Tri-No Enterprises, Inc., a

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* Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

business of which Starnes was president. In addition, the jury found Roland guilty on a separate count of violating the Travel Act, 18 U.S.C. § 1952(a), by travelling across state lines to commit the arson.[1]

Defendants do not contest that they arranged to set the fire and that Starnes filed a claim for the resulting damage with Tri-No's insurer. Instead, Starnes and Roland argue that the evidence is insufficient to establish the intent necessary to sustain their convictions. Alternatively, they contend that if the requisite intent existed a RICO prosecution cannot be brought in connection with a single instance of arson. Defendants also argue that their rights were violated when the prosecution failed to procure for them handwritten notes allegedly taken by an FBI agent while questioning a witness. In addition, Starnes and Roland claim that the district judge was unfairly biased against them, and Starnes asserts that he failed to receive effective assistance of counsel. We affirm.

I.

In 1977, Roland operated a tavern in Gary, Indiana, and also conducted a legitimate demolition business. During December of that year, Roland told Gerald Shurman about a friend of Roland's who wanted to set fire to an office in Illinois in order to destroy records contained in the office. Shurman is a former policeman who was convicted of a felony prior to the events in this case. He had on occasion worked with Roland in the latter's demolition business. Roland offered Shurman approximately two thousand dollars in return for his services in setting the fire. Shurman enlisted the aid of

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[1] Starnes was sentenced to six years imprisonment and fined $5000.00. Roland received the same sentence as Starnes on the RICO charge, and a concurrent term of five years imprisonment and $5000.00 fine on his conviction under the Travel Act.

an acquaintance, Donald Murphy,[2] and the two men met with Roland at the latter's tavern to work out the details for the destruction of the office. During the conversation at the tavern, Roland received and made telephone calls purportedly to the individual who wanted the office burned. Telephone toll records introduced at trial showed that the calls were made to and from a telephone subscribed by Starnes in Texas.

As a result of the meeting, Shurman, Murphy and Roland agreed to travel to southern Illinois where they would set the fire as discussed. They anticipated that the fire would be blamed on the United Mine Workers who were on strike in southern Illinois at the time. The union members worked for some of Tri-No's suppliers, but not directly for Tri-No. It was agreed that the fire had to be set soon, since there was news that the strike would end within a few days.

The three men purchased thirty gallons of flammable lacquer thinner with money supplied by Roland, and set out from Gary at dawn for their destination,[3] a building in the Royal Oaks business complex in Herrin, Illinois. Starnes greeted them when they arrived at the building. Shurman recognized Starnes as a person he had seen before with Roland at Roland's bar.

Starnes informed them that he wanted the entire building destroyed rather than just a single office. The men removed a number of items from the building and obtained additional flammable liquids. They delayed igniting the fire until darkness, leaving Starnes the opportunity to board an airplane flight out of state in order to establish an alibi. The fire then was set.

Starnes had increased his insurance coverage on the building shortly before the fire. Two of Tri-No's

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[2] Shurman and Murphy testified at trial. They were named with Roland in both Counts of the indictment. Shurman pleaded guilty to Count I. Murphy pleaded guilty to Count II. Charges on the remaining Count for each of the men were still pending at the time of trial.

[3] The exact destination apparently was kept from Shurman and Murphy until they were nearly there.

creditors testified that Tri-No was not paying its bills to them and that the creditors had filed suit to recover the money due.

II.

A. Roland first argues that his actions did not constitute a crime because, he says, the government did not prove that he helped set the fire with the intent to defraud an insurer, as required under relevant Illinois law. Ill. Rev. Stat. Chap. 38, § 20-1(b).[4] Starnes contends that he also did not have the requisite intent, and that even if he did he cannot be convicted of conspiracy since none of the others thought that the office fire was started for the purpose of defrauding Starnes's insurer. He argues that he cannot be convicted for conspiring to defraud an insurer with people who do not possess the requisite intent to commit the crime. Defendants' contentions thus depend on whether or not they possessed the intent required by law.

Circumstantial evidence may be used to prove a defendant's intent; indeed, that usually is the only evidence available to show intent. *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *People* v. *Berland*, 74 Ill. 2d 286, 308 (1978) (arson case).

There was sufficient evidence to show Starnes's intent to defraud the insurance company. His business was in need of cash to pay its bills. Starnes, who was president of Tri-No, was well aware that the building was insured and that he recently had increased the insurance coverage. A successful fire was a convenient solution to

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[4] Ill. Rev. Stat. Chap. 38, § 20-1 ("Arson") provides, in pertinent part:

> A person commits arson when, by means of fire or explosive, he knowingly:
>
> * * *
>
> (b) With intent to defraud an insurer, damages any property or any personal property having a value of $150 or more.

his financial problems. He had an adjuster file a claim with the insurer after the fire, even though he was aware he had no basis for the claim under the policy since he was responsible for the fire being set. Taken together, this was ample evidence from which the jury could infer that Starnes possessed the requisite intent. *See generally, People* v. *Berland, supra*, 74 Ill. 2d at 308-09.

Our attention turns, then, to whether the evidence sustains the jury's determination that Roland organized the setting of the fire with intent to defraud an insurer and thus conspired with Starnes and the others as charged. As with Starnes, we conclude that the evidence was sufficient to sustain the jury verdict.

Shurman testified that he had seen Starnes and Roland at the latter's bar long before the arson was contemplated. Roland was the "middle man" in this operation and played the key role in obtaining the services of those who would set the fire. He was in telephone contact with Starnes while Shurman and Murphy laid plans with him for burning the office. This evidence suggests that Roland was privy to Starnes's reasons for setting the fire.

In addition to the evidence regarding Roland's relationship with Starnes, there are other circumstances from which the jury could infer Roland's criminal intent as charged. Roland was a businessman and it is reasonable to conclude that from his own experience he knew that commercial buildings usually are insured. The jury was justified in concluding that Roland would know that Starnes expected to recoup his losses on the building by collecting insurance money. Setting fire to a building, even if intended to be confined only to records in a single office, entails tremendous risk of financial loss, especially considering the amount of flammable liquid the conspirators originally purchased. A jury could reasonably infer that it must have been obvious to Roland that Starnes would not be paying him to cause him (Starnes) great financial loss by burning his own business down for some farfetched public relations

gimmick, or any other reason, unless Starnes had insurance to cover the property loss and otherwise make it all financially worthwhile.

Moreover, several weeks after the blaze Roland told Shurman that the latter would receive full payment "after the insurance settlement was made on the building." The testimony does not suggest that either Shurman or Roland expressed surprise that an insurance claim was involved. Given Roland's business background, the context of his statement to Shurman supplies additional support for the jury's conclusion that Roland intended to defraud Starnes's insurer.

That Roland told Murphy and Shurman only that the United Mine Workers were to be blamed for the fire does not alter the sufficiency of the evidence as to his intent. Murphy and Shurman did not testify that blame was to be placed on the union solely for the purpose of making that organization look bad. Rather, their testimony more plausibly suggests that the strike provided a convenient cover for those who burned the Tri-No offices, diverting attention from the real reasons for the fire. That was why defendants had to move fast in order to take advantage of the timing of the strike, which was about to end.

The evidence sustains the jury's conclusion that Starnes and Roland intended to defraud Starnes's insurer when they conspired to set the fire.

B. Starnes and Roland argue that they could not have conspired to conduct a "pattern" of racketeering activity under RICO since a pattern requires at least two separate racketeering acts as defined by the statute. They contend that since the offense charged involves a single instance of arson no "pattern" of racketeering exists in this case.

Acts of racketeering under RICO include arsons punishable under state law by imprisonment for more than one year, 18 U.S.C. § 1961(1)(A), and crimes indictable under federal mail fraud laws or federal laws that prohibit interstate travel with intent to commit

arson, 18 U.S.C. § 1961(1)(B). Each of those acts is a separate instance of racketeering activity under RICO. When two or more of those acts are connected to each other in some logical manner so as to effect an unlawful end, a pattern of racketeering exists. 18 U.S.C. §§ 1961 (5), 1962(d). *E.g., United States* v. *Stofsky,* 409 F.Supp. 609, 614 (S.D.N.Y. 1973). *See United States* v. *Weatherspoon,* 581 F.2d 595, 601 n.2 (7th Cir. 1978). The RICO provisions are violated when there is a conspiracy to commit more than one of those acts, i.e., a pattern of racketeering directed at an enterprise's affairs.

Defendants' argument that RICO cannot apply to a conspiracy to commit a single arson ignores the statutory scheme just described. While there may indeed have been a single scheme or objective of the conspiracy—the arson —it turned out that several acts of racketeering were contemplated to achieve that objective. Under RICO, the conspiratorial *objective* is a matter different than the *acts* contemplated by the conspirators. Those acts in this case include Roland's travelling with Shurman and Murphy from Indiana to Illinois so they could set the fire in order to defraud the insurer; actually setting the fire in order to defraud the insurer; and then using the mails to complete the fraudulent scheme. Each is a separate act of racketeering.

This circuit previously has considered the position defendants advance. In *United States* v. *Weatherspoon, supra,* the defendant argued that all the mailings for which she was indicted under RICO arose from a single scheme to defraud the Veterans Administration, and thus were not a part of a "pattern" of racketeering. 581 F.2d at 601-02. The court disagreed, finding no support for the argument that RICO "requires[s] a showing of separate and unrelated schemes, as a precondition for finding two indictable 'acts' under 18 U.S.C. § 1341 [mail fraud] that would constitute a 'pattern of racketeering activity' under [RICO]." 581 F.2d at 601 n.2. Thus, the fact that there is but one objective underlying the separate acts does not diminish the applicability of RICO to those acts.

Other courts that have considered the application of the "pattern" provisions of RICO have interpreted the statute in the same manner as we do. For example, in *United States* v. *Chovanec,* 467 F.Supp. 41 (S.D.N.Y. 1979), the court concluded that a single objective to defraud a single victim constituted a RICO offense, when the objective was carried out through several incidents of wire fraud. 467 F.Supp. at 44. *Compare United States* v. *Parness,* 503 F.2d 430 (2d Cir. 1974) (interstate transport of stolen securities as part of single scheme to defraud). *Cf. United States* v. *Anderson,* 626 F.2d 1358, 1371 (8th Cir. 1980), *cert. denied,* ..... U.S. ....., 49 U.S.L.W. 3617 (No. 80-766 Feb. 24, 1981) (dictum disapproving "The Government's view . . . [which] leads to the conclusion that almost any two criminal acts affecting interstate commerce would fall within the ambit of RICO").

We reject defendants' argument that the acts involved in this case do not support the jury's verdict that Starnes and Roland conspired to engage in a pattern of racketeering activity.

C. Defendants contend that there existed no legitimate enterprise in the affairs of which they participated as required by RICO.[5] Starnes and Roland argue that they conspired only to set the fire, which activity they seek to distinguish from participation in Tri-No's business affairs. Their association, they say, was for a wholly illegitimate purpose. Thus, defendants focus on an interpretation of RICO that would exclude associations for purely illegitimate purposes from the coverage of the statute. *Compare United States* v. *Aleman,* 609 F.2d 298 (7th Cir. 1979), *cert. denied,* 445 U.S. 946

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[5] The pertinent RICO provision is contained in 18 U.S.C. § 1962(c), and reads as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(1980) (RICO covers wholly illegitimate enterprises) *with United States* v. *Turkette,* 632 F.2d 896 (1st Cir. 1980), *cert. granted,* ..... U.S. ....., 49 U.S.L.W. 3525 (No. 80-808 Jan. 27, 1981) (RICO covers only infiltration of legitimate organizations).

The government maintains here, as it did at trial, that the "enterprise" involved in this case is Tri-No itself. The focus of the government's case is on the conspiracy as it affected Tri-No's business operations. Starnes participated directly in Tri-No's affairs, says the government, since he was president of the corporation and the arson conspiracy affected business property and insurance coverage. Roland was involved indirectly in Tri-No's affairs, the government contends, because the damage to the building was meant to affect the conduct of corporate business. The government argues that since this case was tried on the basis of the conspirators' participation in the affairs of a legitimate business, there is no reason to consider whether as association solely for illegitimate purposes falls within the terms of RICO. We agree with the government's position and conclude that the evidence is sufficient to establish that Starnes and Roland participated in Tri-No's affairs sufficiently to bring them within the grasp of RICO.[6]

The evidence shows Roland knew that the arson was meant in a literal way to affect the conduct of Tri-No's business. To begin with, Roland had known Starnes for some time and was aware from the start that it was Tri-No's office complex that was to be the site of the arson. It obviously is difficult to operate a business from a burned-out office. Even if we were to assume that the purpose of the arson was only to embarrass the striking union by placing blame for the fire upon it—as defendants argue and we reject—the conspiracy still

[6] Defendants would fare no better even if we accepted their promise that this case concerns the activities only of an illegitimate enterprise. As noted, this circuit has held that RICO covers the activities of a wholly unlawful association. *United States* v. *Aleman, supra,* 609 F.2d at 304-05. There is ample evidence to sustain the conviction on the basis of participation in an illegitimate undertaking.

would be directed to at least one aspect of Tri-No's business conduct: namely, its relations with union-staffed suppliers. As it is, the destruction of Tri-No's business property in order to unlawfully obtain an insurance settlement bears significantly on the corporation's affairs, especially in light of financial difficulties the firm was experiencing.

The participation in the conspiracy of people who were not on the legitimate payroll of Tri-No does not mean those people were not participating in its affairs. The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals. Thus "[t]he substantive proscriptions of the RICO statute apply to insiders *and outsiders*—those merely 'associated with' an enterprise—who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity. [Citations omitted.] Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise." *United States* v. *Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert. denied sub nom., Delph* v. *United States*, 439 U.S. 953 (1978) (emphasis in original).

Tri-No was the enterprise involved in this case. Starnes participated in its affairs directly, including the arson, as the corporation's president. Roland's part in the conspiracy involved his role in Tri-No's unorthodox disposition of its business property and the corporation's resulting insurance claim. The acts of racketeering required the conspirators' direct and indirect participation in the conduct of Tri-No's affairs, and fell within the proscriptions of RICO.[7]

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[7] Starnes and Roland also contend that application of RICO penalties is inconsistent with the philosophy underlying a recent Supreme Court case considering the use of penalty enhancement provisions in the context of double jeopardy claims. As this court previously has noted, RICO is a penalty enhancement scheme unique unto itself and must be interpreted in the context of the evils it seeks to redress—racketeering activity indictable under separate laws. *United States* v. *Aleman*, 609 F.2d 298, 304, 306

(footnote continued)

D. Roland claims that he did not travel interstate with the requisite intent to promote the arson and thus his conviction under Count II of the indictment for a violation of the Travel Act cannot stand. The circumstances of the conspiracy as discussed earlier show that Roland travelled from Indiana to Illinois in order to set the fire with the intent to defraud Tri-No's insurer. There is sufficient evidence to support Roland's conviction under Count II of the indictment.

III.

A. Roland and Starnes contend that their rights were violated when the prosecution failed to turn over the original handwritten notes allegedly taken by an FBI agent during interviews with the government's witness, Shurman. The prosecutor apparently did not have the notes in his possession even if they still existed. Defendants contend that this violated their rights under the Jencks Act, 18 U.S.C. § 3500, and *Brady* v. *Maryland*, 373 U.S. 83 (1963). They argue that since the withholding of exculpatory evidence may be reversible error even if done by someone other than the prosecutor, the

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(footnote continued)

(7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). *See generally* W. HURST, STATUTES IN COURT 141-43 (1970). Defendants' citation of *Busic* v. *United States*, 446 U.S. 398 (1980), is inapposite in this case.

The *Busic* case held that if a statute defining a felony provides for enhanced penalties for use of a weapon in committing the crime, a sentence given under that statute may not be further enhanced by application of separate statutory provisions permitting enhanced penalties generally for such use of a weapon. The Court in *Busic* did not question the penalty-enhancement provision as applied to the underlying felony. Nor did the Court question the constitutionality of the separate penalty-enhancement provision as applied to a felony law lacking its own enhancement clause. Double-enhancement is not present in this case. Rather, we deal here with a single statute aimed at enhancing the usual penalties available under state or federal law for acts associated with racketeering. *Aleman, supra*, 609 F.2d at 306-07. There is no *Busic* situation implied by the facts of this case.

prosecutor's statement was inadequate to safeguard their rights.

During his testimony, Shurman mentioned that Agent Little had taken notes while interviewing him. The formal FBI report on those interviews had been turned over to Roland and Starnes before trial. When defendants sought production of the original notes to supplement the single report already obtained, the prosecutor responded that "[t]hey have every piece of information that the United States Attorney's Office has, Your Honor, and [the single report is] the only one we have." The district judge then told counsel that "maybe we can have a hearing on it or something, out of the presence of the jury, of what to do if [the prosecutors] don't have it." There is no indication in the record that defendants ever sought such a hearing, and none was held. The record also does not disclose any other effort by defendants to discover whether or not the notes in fact existed, a doubt implied by the prosecutor's comment that he also did not have the notes. Agent Little was not called by the defense to answer questions on this matter, although the district court clearly presented that possibility to defendants. FBI Agent Dueker, the chief agent on the case, was called as a defense witness but he was not asked about the existence or whereabouts of the original notes.

There is nothing in this record that suggests the notes could be in some way material to issues involved in the case, as required under *Brady*. *See United States* v. *Crowell*, 586 F.2d 1029 (4th Cir. 1978). Nor did Roland and Starnes attempt to determine that the notes were still in existence and thus obtainable by the prosecutor. The record here is insufficient to establish an issue as to a violation of defendants' *Brady* rights. We decline to decide the question. *Cf. United States* v. *Gray*, 611 F.2d 194, 197 (7th Cir. 1979), *cert. denied*, 446 U.S. 911 (1980) (declining review where factual basis for constitutional claims not before district court).

The record does not support the contention that the notes would have been producible under the Jencks Act.

That Act would require production in this case only if the notes were a substantially verbatim transcript of Shurman's remarks, or were his own written statements adopted or approved by him. 18 U.S.C. § 3500(e). If anything, the record indicates that the notes did not fall within either category, and thus there was no error under the Jencks Act in defendants' failure to obtain the notes.

B. Starnes argues that he was denied the effective assistance of counsel. The only evidence of ineffective assistance to which he directs our attention is his counsel's jocular comment outside the presence of the jury during an instruction conference that Starnes's defense was "temporary insanity."

While Starnes is correct that loyalty and respect must underlie the attorney's relationship to his or her client, there is no indication that those qualities were not present in this case. The offending comment apparently was made to ease the course of a lengthy discussion on the propriety of certain jury instructions. It does not represent such an "utter perversion of the attorney-client relationship" that we need not consider counsel's actual trial performance. *Messelt* v. *Alabama*, 595 F.2d 247, 251 (5th Cir. 1979) (attempt by counsel to have additional charges brought against his client "in an effort to gain more leverage in collecting his fees").

The record taken as a whole does not indicate that Starnes' counsel lacked the experience or ability to adequately represent Starnes so as to fail to meet the "minimum standard of professional representation." *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 641 (7th Cir. 1975), *cert. denied sub nom., Sielaff* v. *Williams*, 423 U.S. 876 (1976); *United States* v. *Chaussee*, 536 F.2d 637 (7th Cir. 1976). To the contrary, the record shows that counsel conducted deft examination of the witnesses, was attentive to and took successful advantage of opportunities to object to the admission of damaging evidence, and presented the facts favoring his client in a thorough and professional manner during

opening statements and closing arguments. His statement during the instructions conference does not justify a finding that Starnes did not have the effective assistance of counsel at trial.

C. Defendants argue that the district judge's inquiry about the possibility of defendants' pleading guilty deprived them of a fair trial. The judge's comments were made out of hearing of the jury during a discussion of the admissibility of certain evidence. The claim of prejudice is without merit.

The district judge's first comment as to the possibility of a plea, to which he did not receive a clear reply, was directed at determining whether or not an extensive voir dire of Shurman would be necessary on the subject of payments made to him by Roland. The evidence was to apply to Roland on Count II of the indictment, which did not name Starnes. Shurman himself had not pleaded guilty on that Count, although he had pleaded guilty on Count I.

Judge Foreman was concerned that the evidence, which could be prejudicial to both Starnes and Shurman, should not be presented if a plea was in the offing. Nothing in the trial record or argument on appeal suggests that Judge Foreman was expressing a view on Roland's and Starnes's guilt.

Shortly after his first question regarding pleas (two pages later in the trial transcript and still out of the jury's hearing), Judge Foreman again asked whether a plea was likely. This was not unreasonable, since counsel had not answered him the first time and the evidentiary question had been only tentatively resolved.

While it is true that a judge's attitudes may have subtle as well as overt influence upon a jury, the record does not indicate the possibility of either sort of influence to the prejudice of defendants. Judge Foreman's remarks were made out of the jury's hearing, and the record indicates that his rulings throughout the trial were even-handed and solicitous of defendants' rights.

Thus, the case before us is unlike *United States* v. *Dellinger*, 472 F.2d 340, 386-89 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), cited by defendants, where the judge's prejudicial comments were made before the jury, pervaded the trial, and were reflected in less than even-handed evidentiary and other rulings. *Compare Bollenbach* v. *United States*, 326 U.S. 607 (1946) (broad hints to jury, clearly prejudicial to the defendant, that they must quickly return a verdict rather than remain deadlocked).

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 21, 1981.

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. William J. Campbell, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 80-1437, 80-1438 vs.

NOBLE R. STARNES and CLIFFORD ROLAND,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois, Benton Division.
No. 78-Cr-02018
James L. Foreman, *Judge.*

ORDER

On consideration of the petitions for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendants-appellants Noble R. Starnes and Clifford Roland, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

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* Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.